Although the hunt for a workable definition of autodialer (automatic telephone dialing system, or ATDS) continues, a calling platform must be “capable of originating a call or sending a text” without human intervention in order to qualify as an autodialer under the Telephone Consumer Protection Act (TCPA), according to a June 25, 2020 declaratory ruling from the Federal Communications Commission (FCC). 1 In issuing its ruling, the FCC conspicuously avoided addressing other key autodialer issues under the TCPA, leaving litigants to continue to grapple with a growing split among federal courts across the country. What constitutes an autodialer—and therefore what types of telecommunications devices may be subject to the TCPA—has been at the heart of thousands of lawsuits filed over the past few years. Over the past year, multiple federal circuit courts have issued diverging opinions with the Second and Ninth Circuits aligning to define autodialer broadly, and the Third, Seventh, and Eleventh Circuits taking a narrower, more business friendly, view. Meanwhile, the FCC comment period aimed at developing new rules closed more than a year-and-a-half ago, and the FCC’s June 2020 ruling leaves the final chapter – and the elusive definition of autodialer – still unwritten.

The key question underlying the dispute over the definition of autodialer is whether the TCPA applies to a dialing system that can call from a stored list of numbers, or whether the TCPA’s autodialing restrictions are instead limited to systems that have the capacity for random or sequential number generation, as the plain language of the statute indicates. Numerous federal appellate courts have considered the issue, and the split in the law is deepening. In light of the TCPA’s statutory damages provision that allows for $500 per violation (and treble damages for reckless or intentional violations), plus attorneys’ fees with no cap on damages, this lack of clarity is particularly concerning in the context of potential class action liability.

The FCC confirms that a manual dialing platform is not an autodialer

The FCC’s June 2020 declaratory ruling states that manual dialing is not autodialing—a proposition that should be obvious by common sense, but which has been muddied by the general uncertainty surrounding the autodialer definition. In response to a petition filed by a coalition of peer-to-peer text messaging services (P2P), the FCC ruled that a calling system is not an autodialer if it is “not capable of originating a call or sending a text without a person actively and affirmatively manually dialing each [call or text]”. A manual dialing system per this order will “require a person to manually send each text message [or call] one at a time.”

The June 2020 ruling is helpful in providing guidance on a range of manual dialing platforms, particularly those that improve the efficiency of manual calling, such as one-touch calls or individual text messages using templates. The FCC
reiterated that the autodialer restrictions do not apply to functions such as "speed dialing," where the caller places the call without dialing all of the digits, because this type of system requires human intervention. Likewise, the FCC rejected arguments that a system's ability to make a large volume of calls is a factor in identifying an autodialer. This was a point made in opposition to the petition by several commentators, who argued that peer-to-peer text platforms are used to send “massive numbers of texts in tiny periods of time” and that “the individual involvement in sending these messages is so vanishingly small as to be meaningless.” But the FCC found that the volume of calls or texts is not dispositive, provided that the system requires the calls or texts to be placed manually, one at a time. Stated differently, a system is not an autodialer if it “lacks the capacity to transmit more than one message without a human manually dialing each recipient’s number.”

Federal circuit courts are split on the autodialer standard

Meanwhile, the FCC's ruling on manual dialing conspicuously avoided wading into the larger and more significant dispute over systems that can dial from lists of stored numbers, and whether such calls are prohibited by the TCPA without prior express consent. Federal appellate courts across the country have taken up this question, reaching divergent answers, and the US Supreme Court may be poised to take up the issue.

The TCPA defines the term an autodialer as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” Although this statutory definition may seem clear enough, the TCPA was passed nearly thirty years ago and, unsurprisingly, does not adequately address contemporary issues presented by current and emerging telecommunications technology. This has led to a long history of twists and turns in the interpretation of the definition. Regulators, courts and business have continued to struggle with the foundational TCPA question of what constitutes an “automatic telephone dialing system” under the statute.

In a 2015 order, the FCC expanded the definition of an ATDS to encompass any equipment that has the capacity or potential capacity to dial numbers without human intervention, even if the caller does not use the device in that capacity or the device requires an upgrade to have those features. In early 2018, however, the FCC’s definition was struck down by the D.C. Circuit Court of Appeals as arbitrary and capricious, and the FCC solicited comments so it could develop a new rule. More than a year-and-a-half has now passed without FCC action, and while the FCC remains silent, federal courts have filled the breach.

The key issue involves the application of the TCPA to systems that dial from lists of stored numbers, specifically, whether the TCPA applies to systems that can “store numbers to be called” from a list, or whether the restrictions apply only to systems that “use a random or sequential number generator” when storing or producing numbers. In 2018, the Ninth Circuit Court of Appeals articulated a
broad standard, holding that an ATDS is a device with the capacity “to store numbers to be called” and to dial such numbers automatically after the system is initiated by a person. More recently, the Second Circuit expressly adopted the Ninth Circuit’s approach, holding that a system is an autodialer if it places calls from stored lists.

Other appellate courts, however, have adopted a narrower definition of autodialer and have held that an ATDS must have the capacity to use a random or sequential number generator, as required by the plain language of the statute. The Eleventh Circuit Court of Appeals came down strongly in favor of this narrow standard, holding that an ATDS must: (1) use a random or sequential number generator either to store or produce telephone numbers; and (2) dial the numbers. The Third Circuit, and most recently the Seventh Circuit, have also adopted this narrow interpretation. As the Seventh Circuit stated, to be an autodialer “a device must be capable of performing at least one of those functions [storing or producing numbers] using a random or sequential number generator.”

Given the stark split among the circuit courts of appeal, the United States Supreme Court may be the final arbiter of the issue, and particularly if the FCC fails to issue new rules or guidance. Pending before the Supreme Court is a petition for writ of certiorari in Facebook, Inc. v. Noah Duguid, Case No. 19-511, a highly watched case from the Ninth Circuit that presents the Court with the opportunity to address the autodialer issue. One of the specific questions on appeal is whether the definition of an ATDS encompasses any device that can “store” and “automatically dial” telephone numbers, even if the device does not use a random or sequential number generator, the issue that defines the split among the circuits. With the Supreme Court's recent decision upholding the constitutionality of the TCPA, in Barr v. American Association of Political Consultants, No. 19-631 (July 6, 2020), the Facebook case could continue the trend of the Court taking at least one TCPA case per term. If the Supreme Court grants certiorari, we anticipate the Court will address this long-unresolved question that goes to the heart of the TCPA.

Conclusion

**Eversheds Sutherland Observation:** The search for a clear definition of an ATDS under the TCPA continues, and the answer remains elusive. The FCC’s June 2020 ruling is a helpful step forward in further confirming that manual dialing is not autodialing, but key questions remain. The business community remains hopeful that the FCC or the courts, including the United States Supreme Court, will finally provide a long-awaited clarity in 2020 that businesses can rely on to understand what constitutes an autodialer and under what circumstances the TCPA will and will not apply.
If you have any questions about this legal alert, please feel free to contact any of the attorneys listed under Related People/Contributors or the Eversheds Sutherland attorney with whom you regularly work.